"Anything I wanted was a phone call away. Free cars. The keys to a dozen hideout flats all over the city… Didn't matter. When I was broke, I'd go out and rob some more. We ran everything. We paid off cops. We paid off lawyers. We paid off judges…Everything was for the taking. And now it's all over."[1]

The introductory excerpt was taken from Nicholas Pileggi's critically acclaimed book entitled, *Wiseguy: Life in a Mafia Family*. Those familiar with the text will undoubtedly remember it as the basis for the Oscar-Award winning film, *Goodfellas*.[2] Yet, Pileggi's book, as it depicts the day-to-day operations of organized crime through the eyes of notorious mobster Henry Hill, was the central focus of a landmark Supreme Court case.[3] In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, the Supreme Court reviewed whether a New York statute, dubbed the "Son of Sam" Law,[4] violated the First and Fourteenth Amendments of the U.S. Constitution.[5] The New York law, which required that an accused or convicted criminal's income from expressive works describing his crime be deposited in an escrow account used, amongst other things, to compensate the victims of the crime, was said to violate the First Amendment.[6] In the Court's unanimous opinion, Justice O'Connor wrote, "the Federal Government and many of the States have enacted statutes designed to serve purposes similar to those served by the Son of Sam law…Some of these statutes may be quite different from New York's, and we have no occasion to determine the constitutionality of

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[1] Nicholas Pileggi, Wiseguy: Life in a Mafia Family 15 (Simon & Schuster, Pocket Books 1st ed. 1985) (1985).
[2] *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).
[3] *See id.*
[4] In 1977, David Berkowitz terrorized New York City with one of the most horrific crime sprees, killing six people and injuring various others. At one of the crime scenes, the killer left behind a lengthy note saying, "I am a monster, I am the son of Sam." This led to a media frenzy, which subsequently dubbed the unknown killer the "Son of Sam." After Berkowitz was arrested, publishers made it publicly known that they were willing to buy the rights to his story. Berkowitz's chance to profit from the crimes while leaving his victims uncompensated was not lost on the New York Legislature, which quickly enacted a statute prohibiting him, or any other criminal, from doing so. *See Simon & Schuster, Inc.*, 502 U.S. at 110.
[5] *Id.*
[6] *Id.*

these other laws."[7] Therefore, the Court did not determine that all "Son of Sam" laws were or would be found unconstitutional, just New York's. This presented the possibility that a law which is crafted narrowly and with more precision than the New York law could survive constitutional review by the Supreme Court.

The New York legislature's apparent dismay at criminals profiting from their crimes was by no means a novel legal concept. In 1882, sixteen-year-old Elmer Palmer, whom was to inherit a large portion of his grandfather's estate, killed his grandfather in order to assure his inheritance.[8] When Palmer tried to claim his endowment, a New York trial court denied his efforts.[9] In affirming the lower court's decision, the appellate court stated, "No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[10] Codification of this principle by state legislatures would take almost ninety years.[11]

Even though the "Son of Sam" laws espouse a laudable principle, it has been met with constitutional resistance. The New York statute initially withstood an attack on grounds of vagueness and an attack on the grounds of impairing contracts, until it was found unconstitutional in *Simon & Schuster*.[12] In that case, the Supreme Court stated that a statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech.[13] It was held the New York's

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[7] *Id.* at 123.
[8] *See Riggs et al v. Palmer et al*, 22 N.E. 188, 189-90 (N.Y. 1889).
[9] *See id*. at 191.
[10] *Id.* at 190.
[11] *See*, e.g., *Simon & Schuster*, 502 U.S. at 109.
[12] Melissa J. Malecki, *Son of Sam: Has North Carolina Remedied the Past Problems of Criminal Anti-Profit Legislation?*, 89 Marq.L.Rev. 673, 675 (2006).
[13] *Simon & Schuster,* 502 U.S. at 115 (citing *Leathers v. Medlock*, 499 U.S.439, 447, 111 S.Ct. 1438, 1443-1444, 113 L.Ed.2d. 494 (1991)).

"Son of Sam" law[14] was indeed a content-based restriction that singled out income derived from expressive activities that the State placed on no other form of activity.[15] In other words, the statute was directed only at works with a specified content—expressive works that mentioned crimes purported by the accused or convicted criminal. The Court has repeatedly stated that such content-based restrictions are *presumptively* unconstitutional, as such if the state can meet the standard of strict scrutiny,[16] the statute will be upheld.

The Court then proceeded into the two prong analysis[17] necessary to determine if the content-based regulation provided a compelling interest to the state and if the statute was narrowly-tailored to that interest. The Court not only found that the statute promoted a compelling interest, but it found two.[18] It said the state maintained a compelling interest in ensuring that victims of crimes are compensated by those who harm them and that the criminals not profit from their crimes.[19] As the statute must be narrowly tailored to ensure these interests, the statute was found to be "significantly over-inclusive."[20] Since the statute could apply to any works involving even the most irrelevant thoughts offered by a criminal about his crimes "however tangentially or incidental" to the work, it

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[14] The New York "Son of Sam" statute required any "entity" contracting with an accused or convicted person for a depiction of the crime to submit a copy of the contract to the New York State Crime Victims Board, and to turn over any income under that contract to the Board. The Board was then required to deposit the payment into an escrow account for possible distribution to the criminal's victims or other creditors. After five years, if no actions were pending, the Board would immediately pay over any money in the escrow account to the convicted. N.Y. Exec. Law § 632 (McKinney 1982).
[15] *Simon & Schuster,* 502 U.S. at 116
[16] "The State must show that its regulation is necessary to serve a compelling interest and is narrowly drawn to achieve that end." *Simon & Schuster,* 502 U.S. at 118 (quoting *Arkansas Writers' Project*, 481 U.S. 221, 231 (1987)).
[17] There is a third prong to the strict scrutiny analysis (*i.e.* the law or policy must be the least restrictive means for achieving that interest). However, the court conspicuously did not include this prong in their analysis.
[18] *Id.* at 119-20.
[19] *Id.*
[20] *Id.* at 121.

did not ensure that the victims would be compensated from the proceeds of the crime.[21] Also, the Court pointed out that since the statute broadly defined "person convicted of a crime" as including "any person convicted of a crime in this state either by entry of a plea of guilty or by conviction after trial and *any person who has voluntarily and intelligently admitted the commission of a crime for which such person is not prosecuted*,"[22] it enabled the board to escrow the income of any author who admitted to having committed a crime, whether or not the author was ever actually accused or convicted.[23] Therefore, the Court held that the New York "Son of Sam" law violated the First Amendment because it was a content-based regulation that did not meet the standard of strict scrutiny by being over-inclusive.[24]

The *Simon & Schuster* opinion dealt a debilitating blow to the "Son of Sam" laws. However, advocates of such anti-profiting laws found the opinion laced with valuable critiques and, above all else, a thinly veiled framework in which to restructure the statutes in order to pass constitutional scrutiny. As such, several states amended their laws to reflect the concerns elucidated by the Supreme Court.[25] For example, in 1994, California amended its law[26] with three distinct features that were said to cure the statute's over-inclusiveness.[27] The first major change was that the law only applied to persons actually

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[21] *Id.*
[22] N.Y. Exec. Law § 632 (McKinney 1982) (Italics added).
[23] At this point in the opinion, the Court enumerates a variety of historical texts that would have fallen under the auspices of this statute, since the authors *casually* mention crimes they committed, if it were in place at the time. The court summarized that works such as the AUTOBIOGRAPHY OF MALCOLM X, Thoreau's CIVIL DISOBEDIENCE, and CONFESSIONS OF SAINT AUGUSTINE would have been under the Board's authority. *See Simon & Schuster*, 502 U.S. at 121-22.
[24] *Id.*
[25] *See* Cal. Civ. Code §2225 (West 1994); Md. Code Ann. Crim., Proc. § 11-622 (West 2003); Nev. Rev. Stat. §217.007 (2005); N.J. Stat. Ann. §52:4B-61 (2003); N.Y. Exec. Law § 632 (McKinney 1992); 42 Pa. Cons. Stat. §8312 (1995); Tenn. Code. Ann. § 29-13-403 (1994); Tex. Code Crim. Proc. §59.01 (2005); Utah Code Ann. §77-18-8.3 (1996).
[26] *See id*.
[27] Cal. Civ. Code §2225 (b)(1)-(b)(2) (West 1994).

convicted of a felony within the state.[28] This key distinction sealed the loophole that an innocent person, who simply mentions that they committed a crime, may have their income confiscated as per the statute's authority. Also, the law now included language that the statute only targeted expressive materials that included the "story" of a felony for which one was convicted except where the materials mention the felony only in passing, "as in a footnote or bibliography."[29] This new language was intended to counter the Supreme Court's contention that expressive materials which only "tangentially or incidentally" mention crime will be susceptible to the statute. Lastly, the California legislature added provision §2225 (b)(2), which applied to "profits" received by the felon from the sale or transfer of any "thing" or "right," the value of which "[was] enhanced by the notoriety gained from the commission of a felony for which a convicted felon was convicted."[30]

The fate of the newly amended California law would be determined in a court of law stemming from an incident that occurred in 1963. Barry Keenan, a penniless member of the Los Angeles Stock Exchange, devised a plan to kidnap Frank Sinatra Jr.[31] and hold him captive from a motel room adjoining the Harrah's Casino in Lake Tahoe.[32] After obtaining the $240,000 ransom and releasing the hostage, Keenan and his associates were quickly arrested, tried, and convicted.[33] Thirty-five years later, Keenan gave a tell-all interview about the kidnapping for an article.[34] The article, cleverly entitled

[28] Cal. Civ. Code §2225 (b)(1) (West 1994).
[29] *Id.* (defining "Story" as "a depiction, portrayal, or reenactment of a felony…but…shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography")
[30] Cal. Civ. Code §2225 (b)(2) (West 1994); *See infra* notes 66-72.
[31] The son of the famed singer, Frank "Blue Eyes" Sinatra, Sr.
[32] Stephen F. Rohde, *The Demise of California's Son of Sam Law: California Followed the Lead of the U.S. Supreme Court in Finding the Law Overinclusive*, 26 L.A.Law. 14, 15 (2003).
[33] *Id.* at 14.
[34] *Id.*

"Snatching Sinatra," attracted the attention of Columbia Pictures which bought the rights for $1.5 million.[35]

The case of *Keenan v. Superior Court* thus ensued from a claim filed by Sinatra Jr. against everyone who partook in the Columbia Pictures deal.[36] The Supreme Court of California, mimicking the decision in *Simon & Schuster*, held that California's "Son of Sam" law still violated the First Amendment and the new amendments did not solve the problems of over-inclusiveness.[37] Similar to the New York statute, it was said to place a direct financial disincentive on speech or expression about a particular subject. With regard to the felony limitation, the Court said that the problem with the law was not semantics, but rather with the values inherent in the First Amendment.[38] In trying to serve the narrow interest of compensating crime victims from the fruits of the crime, the statute still targeted expressive works with a specified content—reference to one's past crimes—even if it was done for non-exploitive reasons.[39] Therefore, limiting the statute's reach to felony convictions did not avoid an overbroad infringement of speech.[40]

The Court then examined the amended language that limited the statute's reach to expressive materials which only contained the "story" of the felony."[41] Even though the Court acknowledged that nothing in the *Simon & Schuster* opinion prevented a legislature from exempting tangential or incidental references in an attempt to cure the

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[35] *Id* at 15..
[36] 117 Cal.Rptr.2d 1 (1999), cert. denied, 123 S. Ct. 94 (2002).
[37] *Id.*
[38] *Id.* at 18.
[39] "One might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; describe the conditions of prison life; or provide an inside look at the criminal underworld." The Court summarized that to mention one's past felonies in the aforementioned contexts may have little or nothing to do with exploiting one's crime for profit, and thus with the state's interest in compensating crime victims from the fruits of the crime. *Id.* at 18-9.
[40] *Id.*
[41] Cal. Civ. Code §2225 (b)(1).

over-inclusiveness,[42] it still found that the statute discouraged the discussion of crimes in non-exploitative contexts. Moreover, section 2225(b)(1) was not focused with sufficient precision on compensating victims with the fruits of the crime, particularly since it left other speech-related income undisturbed.[43] Therefore, the Court concluded that section 2225(b)(1) was an over-inclusive infringement of protected speech, because it targeted expressive materials that included any substantial account of a felony without being narrowly tailored to the interest of compensating crime victims.[44]

After this opinion was delivered, Stephen Rohde, the lawyer who successfully challenged the California law on behalf of Keenan, said, "*Keenan* is another nail in the Son of Sam coffin."[45] Unfortunately, Rohde may be correct in his assessment, as no "Son of Sam" statute has been upheld as constitutional after being challenged in court.[46] Yet, the stratagem applied in most of these cases was identical. As each Court found the statute to be a content-based discrimination, it automatically triggered the standard of strict scrutiny. Thus, in attempting to uphold the statutes as constitutional, the State had to identify a compelling interest promoted by the statute that was narrowly tailored to that interest, a feat not easily accomplished.[47] However, a closer examination of the language in the *Simon & Schuster* framework provides a more manageable route.

In the *Simon & Schuster* opinion, the Court said that the statute was presumptively inconsistent with the First Amendment, because it singled out income

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[42] *Id.* at 19.
[43] *Id.*
[44] *Id.* at 21.
[45] Rohde, *supra* note 32, at 16.
[46] Kathleen Howe, *Is Free Speech Too High a Price to Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 Loy.L.A.Ent.L.Rev. 341, 353 (2004).
[47] As noted by the common legal mantra concerning the standard of strict scrutiny, "Strict in theory, fatal in fact."

derived from expressive activity for a burden "the *State places on no other income*"[48] In other words, since the New York legislature limited the law's reach only to the proceeds from the act of storytelling, the court found no rational explanation why the State had an interest in compensating victims of crimes *only* from their storytelling assets. The law's message was not that crime doesn't pay but that speaking about crime does not pay.[49] As such, the Supreme Court found the state's compelling interest to be diminished. "The State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime."[50] Therefore if a law was crafted so that it avoided this limitation, the law could be considered content-neutral,[51] thereby triggering the lower standard of intermediate scrutiny.[52]

In order to comport with this method, the state must seize a defendant's assets in a content-neutral manner that ensures compensation. Content neutrality may be achieved by targeting all of the criminal's assets, not just those obtained through speech-related activities.[53] For instance, Iowa's legislature amended its statute to define "proceeds" as "the fruits of the crime from whatever source received."[54] Yet, despite the content neutral language of Iowa's amendment, the Court could still find a content-based purpose, since storytelling is their natural target.[55] The Supreme Court has said, "The

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[48] *Simon & Schuster,* 502 U.S. at 116 (Italics added).
[49] *Keenan*, 117 Cal.Rptr.2d at 25 (Brown, J., concurring).
[50] *Simon & Schuster,* 502 U.S. at 120-21.
[51] *Keenan*, 117 Cal.Rptr.2d at 23-4 (Brown, J., concurring).
[52] *United States v. O'Brien*, 391 U.S. 367 (1968) (outlines the less rigorous 'intermediate scrutiny' test).
[53] Sean J. Kealy, *A Proposal for a New Massachusetts Notoriety-For-Profit Law: The Grandson of Sam*, 22 W.NewEng.L.Rev. 1, 13 (2000).
[54] Iowa Code Ann. §910.15(1)(e) (West 1994).
[55] Assembly Bill Memorandum Re: A 9019, July 22, 1977, reprinted in Legislative Bill Jacket, 1977. N.Y.Exec. Law § 823 (New York's legislative history explaining its concern with Berkowitz profiting from his infamy).

mere assertion of a content-neutral purpose will not be enough to save a law which, on its face, discriminates based on content."[56] Even though a statute may not directly discriminate based on content, it may however be considered content-neutral notwithstanding incidental effects on some speakers but not others.[57] In essence, if a statute can be narrowly tailored (*i.e.* confiscating all profits) for a content-neutral purpose (*i.e.* compensating victims of crimes) despite having ancillary effects on some speakers, the Supreme Court could apply a much more lenient content-neutral analysis (*i.e.* intermediate scrutiny).

In some state legislatures, an innovative trend has begun to emerge in order to stop the objectionable practice of criminals selling items associated with the criminals themselves or the crimes.[58] The practice of selling items ranging from paintings and letters to fingernail clippings and hair has been called "murderabilia."[59] Traditional "Son of Sam" laws do not prevent criminals from profiting off non-speech related activities. Consequentially, since murderabilia does not fit within the auspices of these statutes, it is not illegal for criminals to profit from the notoriety of the crimes.[60] This loophole provided an opportunity for legislatures to solve both problems at once. The advent of a "notoriety-for-profit" amendment, making it illegal to profit from any non-speech and

[56] *Turner Broadcast System, Inc. v. FCC*, 512 U.S. 622, 642-43 (1994).
[57] *See generally Ward v. Rock Against Racism*, 491 U.S. 781, 109 S. Ct. 2746, 105 L.Ed.2d 661 (1989); *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). (In these cases, the Supreme Court determined that statutes were content-neutral where they were intended to serve purposes unrelated to the content of the speech, despite their incidental effects on some speakers but not others).
[58] Tracey B. Cobb, *Making a Killing: Evaluating the Constitutionality of the Texas Son of Sam Law*, 39 Hous.L.Rev. 1483 (2003).
[59] *Id.* at 1503-04.
[60] *Id.*

speech related activities, may have strengthened the constitutionality of the "Son of Sam" laws.[61]

As these new statutes apply only to profits gained from the commission of the crime, as opposed to profits gained from expressive materials, it takes the focus away from the actual substance of the criminal's speech.[62] Its focus is now on tangible items and speech. The notoriety-for-profit amendment does not abrogate the restriction on the content of the speech; it simply adds a non-speech element.[63] Moreover, the speech element has been expanded beyond criminals mentioning their past crimes to include all speech-related activities those of which have gained value due to the criminal's notoriety. This concept was echoed by Judge Brown in a concurring opinion to *Keenan*:

> The state's compelling interest in compensating victims from the proceeds of crime would be better served…by making available to a victim *all* the criminal's assets, however and wherever derived. Such an expansion of the resources potentially available to a victim would avoid the statute's Achilles' heel of singling out only expressive activity for a special burden.[64]

Thus, with the inclusion of this principle, a state would ensure that the law is broad enough to encompass *all* profits earned through the commission of a crime, rather than singling out a particular type of speech in expressive materials.[65] This type of statute would be, on its face, content-neutral with a content-neutral purpose, making it more robust against constitutional scrutiny.

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[61] *Id.* at 1506-08.
[62] Howe, *supra* note 46, at 366.
[63] Cobb, *supra* note 58, at 1507.
[64] *Keenan*, 117 Cal.Rptr.2d at 24 (Brown, J., concurring).
[65] Howe, *supra* note 46, at 366.

Any critic who opposes "Son of Sam" laws and is faced with this content-neutral argument will certainly point to the majority opinion in *Keenan v. Superior*.[66] The Supreme Court of California found that the state's "Son of Sam" law violated the First Amendment, despite the inclusion of a "notoriety-for-profit" provision.[67] However, the Court in *Keenan* explicitly stated that determining the constitutionality of provision 2225 (b)(2)[68] which confiscated profits of items enhanced by the felony-related-notoriety was not necessary. The Court's rationale was that provision 2225 (b)(1)[69], alone, sufficed to categorize the entire statute as content-based, and since 2225(b)(2) was "clearly severable," there was no need to determine its viability.[70] Putting it differently, the Court was saying that since provision 2225 (b)(2) was not incorporated into the problematic provision 2225 (b)(1), it was considered an independently added entity to the statute. And since provision 2225(b)(1) rendered the entire statute content-based, there was no need for the Court to examine whether provision 2225(b)(2) would render the statute content-neutral.

Despite the fact that the majority did not tackle the issue of content-neutrality with regard to provision 2225(b)(2), Judge Brown in his concurrence acknowledged the possibility of such an argument. "Section 2225, subdivision (b)(2) avoids content discrimination in its seizure of profits."[71] Judge Brown explains that since the provision is indifferent to the content of expressive and non-expressive materials, it could be

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[66] 117 Cal.Rptr.2d.
[67] *Id.*; Cal. Civ. Code §2225 (b)(2) (West 1994) ("notoriety-for-profit" provision).
[68] "In conjunction with section 2225, subdivision (a)(10), [Section 2225 (b)(2)] authorizes seizure of 'all income from anything sold or transferred by the felon… including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony…" *Keenan*, 117 Cal.Rptr.2d at 26 (Brown, J., concurring).
[69] *See supra* notes 26-44
[70] *See Keenan*, 117 Cal.Rptr.2d at 5.
[71] *Id.* at 26 (Brown, J., concurring)

considered content-neutral.[72] Implicit in his concurrence is the idea that provision 2225 (b)(2), along with the entire statute, was deemed content-based because of the provision's independent status. Therefore if a legislature could incorporate the language of a "notoriety-for-profit" provision into the "Son of Sam" law, rather than being a separate part of a multifaceted law, the unified law would be able to reap the constitutional benefits of that provision.

As of 2001, only three states have included a "notoriety-for-profit" provision in its "Son of Sam" law, while three other states have their laws pending.[73] Regardless of these states' progressive nature, none of them actually incorporated the "notoriety-for-profit" language into the main provision of the law, leaving them susceptible to the majority opinion in *Keenan*. Despite their seemingly misplaced efforts, advocates of "Son of Sam" laws can still obtain statutory language from these six states. For instance, in 2001, Texas amended its law to include a separate "notoriety-for-profit" provision. This provision focused on the increased value an item gains from the notoriety of the crime; "…all income from the sale of tangible property the value of which is increased by the notoriety gained from the conviction of an offense…minus…the fair market value of property that is substantially similar to the property that was sold but that has not been increased in value by notoriety."[74]

Not only is this statutory language reticent of the content of what is being sold, but it also introduces the idea of the criminals gaining the fair market value of the tangible object. As a result, the state only confiscates the value added to the object from

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[72] *Id.*
[73] Cobb, *supra* note 58, at 1505-06 (New York, California and Texas already amended its law to include the provision, while Colorado's, Massachusetts' and Pennsylvania's laws are still pending).
[74] *See* Tex..Crim. Proc. Code Ann. §59.01 (Vernon 2005)

the criminal's infamy.[75] For example, if a convicted felon sold a letter he wrote to one of the victim's families on EBay, the state would be able to confiscate the difference between what the convicted felon's letter obtained and what a normal letter to the victim's family would be worth, thereby, making this type of language, a pure "notoriety-for-profit" provision.

Since the Court in *Simon & Schuster* only gave suggestions on how to create a content-neutral statute, instead of explicitly providing parameters in doing so, it may require more than just including content-neutral language to overcome the constitutional hurdles.[76] The major problem of the New York statute was ultimately its over-inclusive nature. It was not narrowly-tailored to the state's interest of compensating the victim. Other than just including the language of a "notoriety-for-profit" provision, a forward-thinking state legislature could better equip itself if it also amended the statute so that it is better tailored to compensate victims. This may be achieved by altering the definition of a key term: defendant.[77]

To avoid over-inclusiveness, legislators must tailor the statute's focus onto only those offenders who have an obligation to compensate victims.[78] As such, "Son of Sam" laws should only apply to serious crimes, but should not enumerate specific crimes for fear of excluding deserving victims. For example, Iowa defines "defendant" as "a person initially convicted, or found not guilty by reason of insanity…either by a court or jury trial or by entry of a guilty plea in court."[79] Or, it could simply define "defendant" as a felon formally accused or convicted of crimes. Either of these definitions provides a

[75] Cobb, *supra* note 58, at 1509-10.
[76] *See Simon & Schuster*, 502 U.S.
[77] *See* Kealy, *supra* note 53, at 15-6; Cobb, *supra* note 58, at 1510-12.
[78] Kealy, *supra* note 53, at 15.
[79] Iowa Code Ann. § 910.15(1)(a) (West 1994).

statute that includes crimes with a substantial affect on their victims, without limiting the number of victims the "Son of Sam" law is intended to protect.

One may argue that this exact kind of definition was struck down by the Supreme Court of California in *Keenan*.[80] However, a close examination of the reason given in striking down that particular language clarifies the Court's true concern with the New York statute. The majority opinion was explicitly concerned with the values being abandoned by the statute, not the exact language of the statute.[81] In essence, the Court was stating its major objection that the statute unduly discouraged protected expression because of its content, yet again. Therefore, the Court struck down the definition of a defendant because it was simply a part of the content-based statute, not for any fault of its own.

As the rationale underlining the *Keenan* opinion has been assuaged by the content-neutral language of the "notoriety-for-profit" provision, one must examine why the *Simon & Schuster* opinion found its definition over-inclusive. Here we do find a semantics problem, as opposed to the values problem in *Keenan*. In *Simon & Schuster*, the Supreme Court said that the statute was overbroad, because the definition could include those who were not even accused or convicted of a crime.[82] Its fear was that the statute could confiscate the profits of an author who simply mentions that they committed a crime, whether or not they were convicted for it. This concern would obviously be

[80] *See supra* notes 26-28, 36-40.
[81] In its discussion of the felony language, the Court stated, "The court's concern was with the essential values of the First Amendment… the vice of the New York law was that in order to serve a relatively narrow interest—compensating crime victims from the fruits of crime—the statute targeted, segregated, and confiscated *all* income, from, and thus unduly discouraged, a wide range of expressive works containing protected speech on themes and subjects of legitimate interest, simply because material of a certain content—reference to one's past crimes—was included." *Keenan*, 117 Cal.Rptr.2d at 18.
[82] *See supra* notes 22-23.

alleviated by either of the proffered definitions for defendant, as one must be formally accused or convicted of a crime to gain the moniker "felon."

Ever since the Supreme Court delivered its opinion in *Simon & Schuster*,[83] the "Son of Sam" laws have had an uphill constitutional battle. Yet because of their politically popular message of preventing criminals from profiting from their crimes, the laws have thrived through various revisions. Nevertheless, a majority of the revisions were struck down in various state courts for the purported reasons in the Supreme Court case. After the decision in *Keenan*,[84] many thought that the "Son of Sam" laws were dead, and thus began pursuing other routes to prevent criminals from profiting from their crimes.[85] However, as criminals began to carve out the murderabilia market, some state legislatures were able to identify a solution to resurrect the "Son of Sam" laws. As such, lawmakers began drafting "notoriety-for-profit" provisions. Despite their ingenuity, their efforts may have been misplaced by not incorporating the constitutionally viable language into the problematic areas of the statute. Nevertheless, it is undeniably a step in the right direction in making the "Son of Sam" laws constitutional.

[83] 502 U.S. 105.
[84] 117 Cal.Rptr.2d 1
[85] *See Arizona v. Gravano*, 60 P.3d 246 (Ariz. Ct. App. 2002) (In this case, the Arizona Attorney General successfully confiscated the royalties from Sammy "The Bull" Gravano that he received from a book chronicling his life as a mobster. Instead of using the defunct "Son of Sam" law, the Attorney General used the general forfeiture statute which was directed at non-speech activities to convict Gravano.).